WONG CHEE HONG

v.

CATHAY ORGANISATION (M) SDN. BHD.

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
WAN SULEIMAN SCJ
SYED AGIL BARAKBAH SCJ
[CIVIL APPEAL NO. 194 OF 1986]
25 MAY 1987

LABOUR LAW: *Dismissal - "Constructive Dismissal" - Whether doctrine of constructive dismissal applicable in interpretation of s. 20(1) Industrial Relation Act 1967 - Appellant was Personnel and Industrial Relations Manager - Transfer to manage a cinema theatre - Terms and conditions of service remained unchanged - Lesser responsibilities - Whether instruction of employer breach of contract - Appellant refused to accept transfer - Common law and right of employee - Unilateral termination by an employee of his contract.*

LABOUR LAW: *Common Law Test - Whether Industrial Court misdirected itself as to its jurisdiction.*

This was an appeal from the decision of the High Court, Kuala Lumpur which quashed the award of the Industrial Court, as "constructive dismissal" was not within the ambit of s. 20(1) of the Industrial Relations Act 1967 ("the Act") and therefore the Industrial Court had no jurisdiction.

The issue in this appeal was whether the concept of constructive dismissal has application to the interpretation of s. 20 of the Act.

Held:

[1] The word "dismissal" in s. 20 of the Act should be interpreted with reference to the common law principle. Thus it would be a dismissal if the employer is guilty of a breach which goes to the root of the contract or if he has evinced an intention no longer to be bound by it. In such a situation the employee is entitled to regard the contract as terminated and himself as being dismissed.

[2] The transfer, which relegated the appellant to a position of lesser responsibilities, albeit on the same terms and conditions of service, which transfer the appellant refused to accept is a dismissal. It clearly showed that not only the respondent company was displeased with the appellant but it also exhibited the respondent company's intention not to be bound by the contract any longer. Such relegation of responsbility with its consequent humiliation and frustration and loss of estimation amongst his fellow employees made it impossible for the appellant to carry on being employed under the respondent company's organisation. In other words, the appellant had been driven out of his employment, which is therefore a dismissal.

[3] Since the appellant had succeeded in showing that he was dismissed, it was for the respondent company to show that the dismissal was with a just cause or excuse. However, as there was nothing in the finding of the Industrial Court which could be taken into consideration in favour of the respondent company, the dismissal must be no other than that it was unjust and without excuse.

[4] The Industrial Court applied the contract test to the facts which it had found in the case before coming to the conclusion that the appellant was dismissed and therefore it did not misdirect itself in law. As the Industrial Court has directed itself properly in law as to its jurisdiction, its finding and its award was therefore not open for quashing by the High Court and must stand unassailable.

[Appeal allowed with costs. Award of Industrial Court restored.]

Cases referred to:
Western Excavation (EEC) Ltd., v. Sharp [1978] IRLR 27
Marriott v. Oxford and District Co-operative Society Ltd., [1969] 3 All ER 1126
Bouzourou v. The Ottoman Bank [1930] AC 271
Donovan v. Invicta Airways Ltd. [1970] Lloyd's LR 486
Cox v. Philips Industries Ltd. [1976] 1 WLR 638
J.F. Bumpus v. Standard Life Assurance Co. Ltd. [1974] IRLR 232

Legislation referred:
Employment Protection (Consolidation) Act 1978 [UK], ss. 54(1), 55, (2)(c), 57
Industrial Relations Act 1967, s. 20, (1)

For the appellant - K.P. Gengadharan; M/s. Aziz Abdullah & Co.
For the respondent - C.V. Das (M. Nagarajah with him); M/s. Shook Lin & Bok

JUDGMENT

Salleh Abas LP:

This is an appeal from the decision of Harun J issuing an order of *certiorari* quashing an award made by the Industrial Court. The case, we were told, raises an important question of law as to whether or not the doctrine of constructive dismissal is applicable in the interpretation of s. 20 of our Industrial Relations Act 1967.

Before we go into this question, here are the brief facts of the case: the appellant Wong Chee Hong was an employee of the respondent company. He entered the respondent company's service on 31 December 1968 as a junior executive assistant on a salary scale of RM450 x 25 x 12 yrs = 750 (inclusive of 80% basic and 20% Cola). After a short spell of service in Ipoh, with effect from 1 July 1970 he was promoted to the post of assistant supervisor responsible to one Mr. Chu Chi Wang, the respondent company's manager at its Kuala Lumpur office. In that capacity he was required to act as manager of the respondent company's Odeon theatre at Batu Pahat. Later he was further promoted and became the supervisor of Cinema Operations Central and East Coast States. Again, on 1 July 1980 he was further promoted to be the respondent company's personnel and industrial relations manager (P & IRM) for the whole of Malaysia. In that position he was listed as one of the several heads of departments within the respondent company's organization, all of whom including the appellant reported directly to the managing director. As personnel and industrial relations manager the appellant's duty was to negotiate on behalf of the respondent company for a new collective agreement and to implement it. Negotiations were held and these ended in the Industrial Court Award No. 69 of 1985 dated 15 April 1985.

The trouble started after the appellant had taken steps to implement the award. On 14 May 1985 he was called to the office of the managing director (MD), who curtly told him (the appellant) that he was being transferred to the Cinema Operations Department and, as such, he would be accountable to one Mr. Cheah Kong Fatt, and that his own department (Personnel and Industrial Relations Department) would be given to his assistant. To confirm this new arrangement, the MD wrote a letter to the appellant to that effect dated 14 May 1985. On

inquiry by the appellant as to his new job functions, the MD in a letter dated 22 May 1985 informed him that with effect from 1 June 1985 the appellant was seconded to manage the respondent company's cinema theatre at the Overseas Union Garden, Kuala Lumpur and to take charge of the theatre from one Mr. Kan Man Fatt. He was also told in the same letter that the terms and conditions of his service remained unchanged. On 30 May 1985 the MD again abruptly issued an instruction to the appellant to hand over all files, working papers and documents relating to the Personnel and Industrial Relations Department to him (MD) before he (the appellant) left to take over the charge of the cinema theatre at the Overseas Union Garden, Kuala Lumpur.

Unhappy at the turn of events arising out of what the appellant thought that he was merely doing his duty in negotiating a new collective agreement and taking steps to implement it, on 31 May 1985 he wrote to the MD stating that he was not prepared to accept the transfer order and regarded the MD's instructions as a breach of contract entitling him to hold the respondent company liable for dismissing him without just cause or excuse. The MD replied denying dismissing the appellant because his terms and conditions of service remained unaltered and further because the secondment to manage a cinema theatre was "a normal part of managerial exchange of staff between the cinemas and head office so as to promote a better understanding among office staff and the operational level cinema staff."

On 1 June the appellant did not report for duty as instructed by the MD. This prompted Mr. Cheah Kong Fatt, the Divisional Manager Cinema Operations, to whom the appellant was required to report, to write two letters to the appellant, 10 June and 29 June, regarding the appellant's refusal to accept the transfer order. Finally, the matter reached the Industrial Court by way of reference under s. 20 of the Industrial Relations Act 1967. The Court gave an award in favour of the appellant holding that the appellant was constructively dismissed and awarded him a sum of RM70,633 as compensation to be paid by the respondent company.

The application for *certiorari* by the respondent company was heard by Harun J who ordered the award to be quashed because, according to a brief note recorded by the learned Judge, "constructive dismissal is not within the ambit of s. 20(1) of the Industrial Relations Act. Industrial Court therefore had no jurisdiction."

It is from this decision that we are now concerned in this appeal. Apart from this cryptic note the learned Judge wrote no grounds of his decision which would enlighten us on the law of the so called constructive dismissal. This is unfortunate because we have been so much handicapped in our deliberation. We hope that Judges should endeavour to write their grounds of decision and take delight in this aspect of judicial work as a matter of personal pride and satisfaction and not as a burden Failure on the part of Judges to write their grounds of decision will certainly undermine their authority to insist upon Magistrates and Presidents of Sessions Court to write theirs. If the practice of not writing grounds of judgment is widespread the system of administration of justice will tumble down.

However, in view of the importance of the question raised, we have to proceed with this appeal and spend a considerable length of time to hear both counsel taking us through a journey of technicality into English law on unfair dismissal and constructive dismissal.

The issue in this appeal is as stated earlier, whether the concept of constructive dismissal has application to the interpretation of s. 20 of our Industrial Relations Act. Therefore we must know and be clear precisely in our mind what a constructive dismissal is.

In England where this expression originated there had been a great deal of unsettled opinions amongst chairmen of industrial tribunals and also among Judges who sat to hear appeals from those tribunals. According to the Court of Appeal in *Western Excavation (ECC) Ltd.*

v. Sharp [1978] IRLR 27, it means no more than the common law right of an employee to repudiate his contract of service where the conduct of his employer is such that the latter is guilty of a breach going to the root of the contract or where he has evinced an intention no longer to be bound by the contract. In such situations the employee is entitled to regard himself as being dismissed and walk out of his employment.

Historically the expression "constructive dismissal" arose into great prominence in connection with the interpretation of several pieces of labour legislation passed by the UK Parliament. The first was the Redundancy Payment Act 1965 which was aimed at giving relief to employees who are dismissed on account of redundancy. Such employees are entitled to a compensation known as redundancy payment. The second legislation was the Industrial Relations Act 1971. This Act introduced a concept of unfair dismissal in that it guaranteed to an employee a protection against unfair dismissal by his employer. The third legislation was the Trade Union and Labour Relations Act 1974 which is a consolidation of the previous two legislations, i.e., 1965 Act and 1971 Act. A further consolidation was effected by the Employment Protection Act 1978.

As to unfair dismissal, a provision is enacted in every one of these three legislations, i.e., the 1971, 1974 and 1978 Acts to the effect that an employee has the right not to be unfairly dismissed by his employer (see s. 54(1) of the 1978 Act). The Acts also define "dismissed" or "dismissal" and lay down the criteria which would constitute fairness or unfairness of a dismissal (see the 1978 Act, s. 55 as to "dismissal" or "dismissed" and s. 57 as to fairness of dismissal). We are here only concerned with the definition of "dismissed" or "dismissal". For this purpose we reproduce here the relevant provision of s. 55 of the 1978 Act as follows:

> **Meaning of unfair dismissal**
>
> 55. (1) In this Part, except as respects a case to which s. 56 applies, "dismissal" and "dismiss" shall be construed in accordance with the following provisions of this section.
>
> (2) Subject to subsection (3), an employee shall be treated as dismissed by his employer if, but only if,:
>
> (a) ...
>
> (b) ...
>
> (c) the employee terminates that contract, with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct.

It is in connection with the interpretation of para. (c) of sub-section (2) that the doctrine of "constructive dismissal" became currently used and gave rise to so much divergence of opinions until it was finally put to rest by the Court of Appeal in the *Western Excavation* case (*supra*).

The common law has always recognized the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as affects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer. It was an attempt to enlarge the right of the employee of unilateral termination of his contract beyond the perimeter of the common law by an unreasonable conduct of his employer that the expression "constructive dismissal" was used. It must be observed that para. (c) never used the words "constructive dismissal". This paragraph simply says that an employee is entitled to terminate the contract in circumstances entitling him to do so by reason of his employer's conduct. But many thought, and a few decisions were made, that an employee in addition to his

common law right could terminate the contract if his employer acted unreasonably. Lord Denning MR, with whom the other two Lord Justices in the case of *Western Excavation* (*supra*) reiterating an earlier decision of the Court of Appeal presided by him (see *Marriott v. Oxford and District Co-operative Society Ltd.* [1969] 3 All ER 1126) rejected this test of unreasonableness. In no uncertain terms the learned Master of the Rolls declared that the test of dismissal in respect of para. (c) is a contract test. In his view the Act draws a distinction between "dismissal", which is in one section and "unfairness" which is in another section and moreover the paragraph is using legal connotations, such as the words "notice" and "entitled".

Thus it is clear that even in England, "constructive dismissal" does not mean that an employee can automatically terminate the contract when his employer acts or behaves unreasonably towards him. Indeed if it were so, it is dangerous and can lead to abuse and unsettled industrial relation. Such proposition was rejected by the Court of Appeal. What is left of the expression is now no more than the employee's right under the common law, which we have stated earlier and goes no further. Alternative expression with the same meaning, such as "implied dismissal" or even "circumstantial dismissal" may well be coined and used. But all these could not go beyond the common law test.

Turning back to our case under appeal, it is not enough for the learned Judge in the Court below to say that constructive dismissal has no application to the interpretation of s. 20 of the Industrial Relations Act. He must go further and say which of the two alternative views on constructive dismissal has no application and if so, why? Whilst we think that "constructive dismissal" with unreasonableness test does not apply, it will be wrong for anyone to hold that "constructive dismissal" with contract test does not apply. Perhaps in the context of our law it is better that we do not use the terminology at all.

When the Industrial Court is dealing with a reference under s. 20, the first thing that the Court will have to do is to ask itself a question whether there was a dismissal, and if so, whether it was with or without just cause or excuse. Dismissal without just cause or excuse may well be similar in concepts to the UK legislation on unfair dismissal, but these two are not exactly identical. Section 20 of our Industrial Relations Act is entirely different from para. (c) of s. 55(2) of the UK Protection of Employment Act 1978. Therefore we cannot see how the test of unreasonableness which is the basis of the much advocated concept of constructive dismissal by a certain school of thought in UK should be introduced as an aid to the interpretation of the word "dismissal" in our s. 20. We think that the word "dismissal" in this section should be interpreted with reference to the common law principle. Thus it would be a dismissal if an employer is guilty of a breach which goes to the root of the contract or if he has evinced an intention no longer to be bound by it. In such situation the employee is entitled to regard the contract as terminated and himself as being dismissed. (See *Bouzourou v. The Ottoman Bank* [1930] AC 271 and *Donovan v. Invicta Airways Ltd.* [1970] Lloyd's LR 486).

In *Bouzourou's* case an employee would have been entitled, according to the Privy Council, to regard himself as being dismissed if his transfer from one province to another province rendered him exposed to an immediately threatening danger of violence or disease to his person. And in *Donovan's* case the Court of Appeal held that when the conduct of the employer was such that it rendered the continuance of the employee's service impossible, the latter was entitled to treat the contract as at end and to obtain damages for wrongful dismissal.

Now how do we apply the common law principle to the facts of the case under appeal. First we have to see the facts in their proper perspective. There can be no doubt, as found by the Industrial Court that the appellant was lawfully doing his duty as the personnel and industrial relations manager of the respondent company when he negotiated a new collective agreement, represented the respondent company in the negotiations, obtained an award, and implemented it. The reward for lawfully performing his duties was not promotion, but a demotion. From being the head of one of the respondent company's departments, he was reduced to a mere cinema-manager, a position which he had held some fifteen years ago as a junior executive. No doubt his terms and conditions of service remained unaltered and the transfer was part of the terms of his employment. But with respect we cannot accept that either of these two factors or both of them entitled the respondent company to insist upon the appellant to obey its instruction. The respondent company must have known that no man, worthy of a minimum self respect would accept a transfer with a demotion in rank, stripped of all the powers he once enjoyed amongst his fellow employees. This is not a transfer but a demotion, a punishment meted out without any disciplinary action taken. What is worse is that it was inflicted not for doing a wrong act, but for doing the right thing - i.e., to negotiate and conclude a new collective agreement, which ended in an Industrial Court award and to implement it. The appellant may well be hasty in that he did not obtain permission from nor consult his superior officer (MD) before implementing the award, but this error in our view hardly justifies sending the appellant down without power and designation. One of the higher interests of law is surely that an order of the Court - and this included awards of the Industrial Court - must be obeyed; otherwise the system of justice will be thrown helter-skelter with grave consequences, leading to erosion of public confidence in it. The respondent company's plea that the appellant's terms and conditions of service remained unaffected, in our view, sounds so hollow that it belies its truth and sincerity. We have perused the award of the Industrial Court and we fully concur with the comments, observation and findings made in the award regarding these two factors. Thus in our judgment the transfer, which relegated the applicant to a position of lesser responsibilities, albeit on the same terms and conditions of service, which transfer the appellant refused to accept is a dismissal. It clearly shows that not only the respondent company was displeased with the appellant but it also exhibited the respondent company's intention not to be bound by the contract any longer. Such relegation of responsibility with its consequent humiliation and frustration and loss of estimation amongst his fellow employees made it impossible for the appellant to carry on being employed under the respondent company's organization. In other words he had been driven out of his employment. This is therefore a dismissal. (See *Cox v. Philips Industries Ltd.* [1976] 1 WLR 638 and *J.F. Bumpus v. Standard Life Assurance Co. Ltd.* [1974] IRLR 232).

The next question is this. Is the dismissal with a just cause or excuse? Since the appellant has succeeded in showing that he was dismissed, it is for the respondent company to show that the dismissal was with a just cause or excuse. We found nothing in the finding by the Industrial Court which we could take into consideration in favour of the respondent company. We are left with the finding of the Court pointing a strong indictment against the respondent company, which it is unable to rebut. That being the case, the dismissal must be no other than that it was unjust and without excuse.

Looking at the award, it is clear to everyone that the Industrial Court in coming to the conclusion that the appellant was dismissed did not misdirect itself in law. The Court only spoke of constructive dismissal in the context of contract test. It never even made any reference to unreasonableness test. This is made clear by the following passage at p. 9 of the award.

> Past cases of constructive dismissals dealt with by this Court ... are agreed that whether or not there has been constructive dismissal is to be determined by the contract test: that is, did the employer's conduct amount to a breach of contract which entitled the employee to resign? And did the employee make up his mind and act at the appropriate point in time soon after the conduct of which he complained had taken place.
>
> (Otherwise he would be regarded as having elected to affirm the contract and would lose the right to repudiate the contract, i.e., to treat himself as discharged.)
>
> (The words in brackets are ours)

We accept this passage to be the correct statement of the law. The questions asked by the Industrial Court in fact are similar to that part of the judgment of Lord Denning MR in the *Western Excavation* case where the learned Master of the Rolls set out the contract test. Only in these circumstances can an employee be held to be constructively dismissed and that is what constructive dismissal is.

The Industrial Court applied this test to the facts which it had found in the case and before coming to the conclusion that the appellant was dismissed, it examined the evidence and dealt with the issues before it very carefully and most admirably. We cannot see how its award therefore could be open for quashing by the High Court. So long as the Industrial Court directed itself properly in law as to its jurisdiction, its finding and therefore its award must stand unassailable.

For the reason stated above, we therefore allow the appeal with the costs here and in the Court below. The award of the Industrial Court which was quashed by the High Court is now restored.

Also found at [1988] 1 CLJ 45